United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4137

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BHARATKUMAR BACHUBHAI DESAI,

Petitioner,

-v-

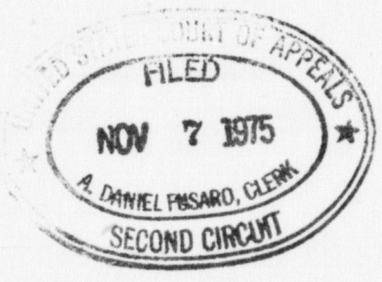
IMMIGRATION and NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF ADMINISTRATIVE AGENCY ACTION

Docket No. 75-4137

BRIEF FOR APPELLANT



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ISSUES PRESENTED FOR REVIEW

1. The Immigration Judge denied voluntary departure on the ground that the alien had sworn falsely. It is our contention that he did not, in fact, swear falsely.

2. The Immigration Judge denied adjustment of status to that of a permanent resident on the ground that the labor certification was not valid in that the alien did not have the required experience. Evidence in the record shows that the alien was, in fact, qualified for the labor certification.

3. The Board of Immigration Appeals denied the Motion to Reopen to apply for adjustment of status based on a new labor certification. It is our contention that the denial of this motion was an abuse of discretion.

STATEMENT OF THE CASE

The alien was admitted to the United States as a non-immigrant student on February 5, 1970, and was authorized to remain in the United States until September 26, 1973. He remained after that date, and an Order to Show Cause why he should not be deported from the United States was issued on January 8, 1974.

A deportation hearing was held on September 24, 1974, in Newark, N. J., at which the alien applied for the alternate relief of adjustment of status to permanent residence or

voluntary departure. (Administrative Record, item 20). He had a labor certification from India Phernalia, a store in Philadelphia, as a store manager, and presented a letter of experience from Bharat Enterprises in India.

The hearing was continued on January 6, 1975, and at that hearing the alien admitted the fact that his previous letter of experience was false. The Immigration Judge denied the application for permanent residence for lack of a valid labor certification, and denied voluntary departure on the ground that the alien had sworn falsely in the hearing of September 24, 1974. (Administrative Record, item 13). These decisions were appealed to the Board of Immigration Appeals, which denied the appeal of April 24, 1975.

The alien then obtained a new labor certification from a different firm and sought to reopen his case by motion to the Board of Immigration Appeals. This motion was based on new evidence from India concerning his employment there. The motion was denied on July 24, 1975. The present action was filed on July 9, 1975.

ARGUMENT

I. THE DENIAL OF VOLUNTARY DEPARTURE WAS INCORRECT BECAUSE ALIEN NEVER GAVE FALSE TESTIMONY.

The reason advanced by the Immigration Judge for the denial of voluntary departure was that the alien was statu-

torily ineligible under IMMIGRATION AND NATIONALITY ACT, Sec. 101(f)(6), 8 U.S.C. Sec. 1101(f)(6), as one who "has given false testimony for the purpose of obtaining any benefits under this Act." The Immigration Judge stated that the alien "confirmed and repeated on direct examination his alleged experience in India." (Oral Decision of the Immigration Judge, p. 3). A careful reading of the entire transcript of hearing discloses that the alien never gave false testimony concerning his prior employment in India. He merely stated that he had worked as a store manager and later that he had done exporting and that he had started as a part-time clerk and had become "like a manager" in charge of exporting things. This is consistent with his later testimony that he was, in fact, employed in his father's business. (Transcript of Hearing, pp. 5, 8-9, 21-22). Mr. Desai never stated under oath precisely where he had worked or that the letter he had submitted was true; he merely testified concerning the type of work and study he had done.

It is true that the information on the alien's Application for Alien Employment Certification was not correct with regard to his past experience in India; however, this did not constitute false testimony as required by Section 101 (f)(6). Sharaiha v. Hoy, 169 F.Supp. 598 (S.D. Cal. 1959); Matter of L---D---E---, 8 I. & N. Dec. 399, which distinguishes Orlando v. Robinson, 262 F.2d. 850 (7th Cir. 1959). See also Matter

of M., 9 I. & N. Dec. 118. These cases all construe testimony as including only oral testimony under oath, not writings.

It should be emphasized that the Immigration Judge indicated that he "might have been disposed to grant him such relief" but that he felt himself barred by the statute. Since the alien did not, in fact, give false testimony, voluntary departure should have been granted.

II. ANY INCONSISTENCIES BETWEEN THE ALIEN'S TESTIMONY OF SEPTEMBER 24 AND HIS TESTIMONY ON JANUARY 6 ARE SO MINOR AS TO BE IMMATERIAL.

The labor certification originally presented by the alien required two years experience as "manager." or, in the alternative, two years as import/export manager handling this merchandise. His experience with his father, detailed on pages 21 and 22 of the transcript, adequately met this requirement. Concededly, the alien had no direct experience in import/export work as mentioned in the Transcript, Page 9, line 1, but he immediately thereafter stated that he had studied chis and that was where he had obtained his knowledge. In any case, import/export experience was not required by his labor certification; therefore this one minor inconsistency is immaterial. Chaunt v. United States, 364 U.S. 350, 81 S. Ct. 147, 5 L.Ed.2d 120 (1960). Cases contra are those in which the misstatement is considerably more serious and obvious. In re Maria Haniatakis, 376 F.2d. 728 (3rd Cir. 1967), In re Kovacs, 476 F.2d. 843 (2nd Cir. 1973)

III. THE DENIAL OF THE MOTION TO REOPEN WAS IMPROPER AND AN ABUSE OF DISCRETION

The appellant obtained a new labor certification and requested reopening of his hearing. The denial of this motion by the Board of Immigration Appeals was improper. 8 C.F.R. Sec. 3.2 states that the evidence sought to be introduced must have been available at the earlier hearing; in the instant case this is clearly true, since new evidence had arrived from India concerning the alien's employment there and the labor certification from a new employer had recently been obtained.

Since the evidence sought to be introduced was relevant and material, the case should have been reopened.

CONCLUSION

The alien is entitled to the following relief, in the alternative:

1. His hearing should be reopened to allow him to renew his application for permanent residence based on his proof of experience now available, and on his new labor certification; or

2. He should be granted the privilege of voluntary departure from the United States since he is not statutorily ineligible for that relief, and the Immigration Judge has

stated that he might have granted that relief but for the alleged statutory bar.

ADDENDUM

Immigration and Nationality Act, Sec. 101(f)(6), 8 U.S.C. Sec. 1101(f)(6):

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was --

.....

6. one who has given false testimony for the purpose of obtaining any benefits under this Act..."